



NO. 88-162

SUPREME COURT OF THE UNITED STATES

October, Term, 1987

CLEVELAND BOARD OF EDUCATION
Cross-Petitioner

- VS -

JAMES LOUDERMILL
Cross-Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CROSS-RESPONDENT'S
BRIEF IN OPPOSITION TO
CROSS-PETITION FOR A WRIT OF CERTIORARI

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I

PARTIES

The Plaintiff-Appellee in the proceeding in the Court of Appeals was James Loudermill. The Defendant-Appellant in the Court of Appeals was the Cleveland Board of Education.

II

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Ohio on the merits was dated October 17, 1986, while the decision of that court on the request for attorney fees was dated February 25, 1987, but not made into an order until April 13, 1987.

The United States Court of Appeals for the Sixth Circuit's Opinion affirming both judgments was dated April 6, 1988.

Both Opinions are set forth in the Cross-Respondent's (Loudermill's) Appendix, while the district court's Opinion regarding the attorney fees issue is in the Cross-Petitioner's (Board's) Appendix. However, the Board has neglected to include the district court's Opinion of April 13, 1987, rendered under F.R.C.P. 54(b), wherein it made its' February 25, 1987 Opinion into a final order.

STATEMENT OF THE CASE

Loudermill's appeal to the Court of Appeals on the merits was docketed by that court as Case No. 86-4069, while the Board's subsequent appeal on the sole issue of attorney fees was later docketed as Case No. 87-3435. For convenience and accommodation purposes only, the Court of Appeals then consolidated both appeals for argument and decision upon the request of the Board.

In its' Cross-Petition, the Board states that it is seeking review of the judgment of the Court of Appeals in Case No. 86-4069. Not so! That appeal involved the judgment on the merits only, and did not seek review of the award of attorney fees judgment.

As such, the Board is actually seeking review of Case No. 87-3435, which involved the appeal from the order granting Loudermill's counsel's request for attorney fees. Again, although both appeals were consolidated for purposes of oral argument and decision in the Court of Appeals, they still remain two separate appeals from two separate judgments, and bear two separate case numbers for purposes of review by this Court.

Consequently, the Cross-Petition for a Writ of Certiorari (seeking review of the attorney fees issue only, and filed in this Court on July 23, 1988), was not filed within ninety (90) days of the April 6, 1988 Court of Appeals Opinion in Case No. 87-3435, (but rather 108 days), as required by 28 U.S.C. Sec. 2101(c), and this Court's Rule 19.5 is inapplicable as the Court of Appeals decision pertained to two (2) judgments, not just one judgment.

FACTS

In 1981, Loudermill filed a class action Complaint in the United States District Court for the Northern District of Ohio wherein he sought to establish federal Due Process pretermination procedures for all tenured governmental employees in the United States, as well as obtain re-instatement to his job with the Board.

Even though the Loudermill case was never certified as a class action, Loudermill succeeded in establishing federal Due Process safeguard procedures by the original decision of the Sixth Circuit Court of Appeals, 721 F.2d 550 (1983), and the decision of this Court, 470 U.S. 532 (1985).

Upon remand by this Court to the district court, the district court subsequently found that Loudermill had received a pretermination hearing that complied with federal Due Process, but also found that he was a "prevailing party" entitled to an award of attorney fees, even though he did not obtain any individual relief, because as a direct result of his lawsuit he obtained a U.S. Supreme Court decision that pretermination Due Process hearings must be provided to any governmental employee who had a constitutionally protected property interest in his employment. The district court also found that subsequent to this Court's 1985 Loudermill decision, the Cleveland Civil Service Commission amended its Rules to provide for pretermination procedures -- which then became the Rules for the Board's termination of a tenured employee under Ohio law.

Contrary to the assertions of the Board, Loudermill presented evidence to the district court as to the Rules of the Cleveland Civil Service Commission both prior and subsequent to this Court's 1985 Loudermill decision.

On the other hand, the Board never presented any evidence

whatsoever in support of its assertion that it did not change any of its procedures as a result of the Loudermill decision.

It should also be noted that it was the Board who sought review by this Court of the 1983 Court of Appeals decision, which held that federal constitutional Due Process required some pretermination procedures.

Obviously, the Board (and 19 other states as amicus curiae) were trying to protect their previously enjoyed right to terminate tenured governmental employees without any pretermination procedures.

REASONS FOR DENYING CERTIORARI

As has been pointed out, it should suffice that an appeal to this Court which was filed 108 days after judgment (even if erroneously styled as a Cross-Petition under Rule 19.5) is untimely filed; should not have been accepted and filed by the Clerk, and must be stricken. In the possible event that this Court does not agree with Loudermill's reasoning, then he here-with submits further reasons as to why the Cross-Petition of the Board should not be accepted by directly responding to the four Questions propounded by the Board.

Before that, however, Loudermill would like to make it clear that a request for attorney fees in a federal civil rights case raises issues that are collateral to, and separate from, the decision on the merits. White v. New Hampshire Department of Employment Security, 455 U.S. 445,451-452 (1982); Buchanan v. Stanships, Inc., ___ U.S. ___, ___, 108 S.Ct. 1130,1131-1132 (1988) and Budinich v. Dickinson Co., ___ U.S. ___, ___, 108 S.Ct. 1717, 1721 (1988).

Since the Cross-Petition involves a separate judgment, the Board was not entitled to the extra thirty (30) day extension of time for filing provided by this Court's Rule 19.5.

I. LOUDERMILL SUCCEEDED ON A SIGNIFICANT ISSUE INVOLVED IN THE LITIGATION THAT ACHIEVED A PRIMARY BENEFIT SOUGHT BY HIM IN HIS ORIGINAL SUIT.

Initially, on page 8 of its Cross-Petition for a Writ of Certiorari, the Board states that this Court's prior decision in this case, 470 U.S. 532 (1985), did not declare Ohio Rev. Code Sec. 124.34 unconstitutional. If we deal in semantics, perhaps it could be said that R.C. 124.34 was not killed by this Court, but it was certainly mortally wounded by the language to be found at page 541:

In short, once it is determined that the Due Process Clause applies 'the question remains what process is due.' Morrisey v. Brewer, 408 U.S. 471,481 (1972). The answer to that question is not to be found in the Ohio statute. (Emphasis)

Additionally, on page 8 of the Board's Cross-Petition, it is stated that Loudermill did not seek the right to a pretermination hearing in his Complaint. Now, just a minute! In his Complaint, the following language is to be found:

19. The plaintiff was not given any opportunity prior to his removal to respond to the charges against him although he had a legitimate defense since he thought that he was convicted of a misdemeanor.

23. The plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the defendants Cleveland Board of Education and Cleveland Civil Service Commission when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution to his claim that his removal was unlawful and unfair.

25. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

Of determinative importance, however, the right to any sort of pretermination procedures for tenured governmental employees was certainly not the law in Ohio prior to this Court's 1985 Loudermill decision. Parfitt v. Columbus Correctional Facility, 62 Ohio St.2d 434,438 (1980).

In its second Opinion in this case, the Sixth Circuit Court of Appeals found that even though this case was never certified as a class action; nevertheless:

[t]he Supreme Court granted relief to Loudermill's class, over 16 million tenured governmental employees, and this relief was the type originally sought by Loudermill.

After Loudermill, as his attorneys demonstrated in the lower court, the Cleveland Civil Service Commission changed its rules to comply with the procedures mandated by the Supreme Court. As such, Loudermill has established a causal relationship between his lawsuit and the change of pretermination procedures as required by law. Because of this change, it was not an abuse of discretion for the district court to hold that he was the 'catalyst' in procuring this change even though he garnered no individual relief.

In sum, all of the Board's arguments ignore the effect that the Supreme Court's landmark decision in Loudermill has had on this area of federal constitutional rights. As such, the lower court did not abuse its discretion in holding Loudermill to be a 'prevailing party' and thereby granting him attorney fees.

(Loudermill Petition, Ct. of App. Op., page 18.)

Moreover, the legislative history of the federal civil rights attorney fees statute, 42 U.S.C. Sec. 1988, approved the award of attorney fees when a party was successful in obtaining benefits for a class, even though he received no personal relief. Hensley v. Eckerhart, 461 U.S. 424,452-453 n.9 (1983). (Brennan, J., concurring in part and dissenting in part).

II. LOUDERMILL CAUSED A CHANGE IN THE PROCEDURAL REQUIREMENTS OF THE CLEVELAND BOARD OF EDUCATION REGARDING THE DISCIPLINING OF ITS TENURED EMPLOYEES.

On page 9 of its Cross-Petition, the Board states that the only evidence presented to the district court on the issue of attorney fees was an update of the Rules of the Cleveland Civil Service Commission.

Factually, Loudermill presented the district court with the Rules of the Cleveland Civil Service Commission prior to this Court's Loudermill decision (which made no provision for any pretermination procedures), as well as the Rules enacted after such decision (which did provide for pretermination procedures).

Attention is directed to the fact that under Ohio Rev. Code Sec. 124.40(A) the Rules of the Cleveland Civil Service Commission for the disciplining of tenured employees are the same Rules for the Cleveland Board of Education. Lorain Board of Education v. Lorain Civil Service Commission, 30 Ohio App.3d 127 (1985). Also see the Sixth Circuit Court of Appeals decision herein to the same effect. (Loudermill Petition, Appendix, page 16, n.6).

At the trial upon remand, the Board failed to present even a scintilla of evidence that it had a practice of providing pre-termination procedures to its tenured employees prior to the Loudermill decision.

III. THE ACTUAL FEDERAL CONSTITUTIONAL DUE PROCESS PRETERMINATION REQUIREMENTS WERE NOT DETERMINED BY THIS COURT UNTIL THE LOUDERMILL DECISION.

The Board contends in its Cross-Petition that the right to pretermination procedures was established prior to this Court's 1985 Loudermill decision, citing Davis v. Scherer, 468 U.S. 183, 192 n.10 (1984).

It is interesting to note that during the original appeals to the Sixth Circuit and this Court, the Board's steadfast position was that, based upon prior decisions of this Court, Due Process did not require any pretermination procedures. Besides, this Court in Davis v. Scherer, supra, held that it had not as yet determined what kind of pretermination hearing had to be provided under Due Process, and that the employer was entitled to qualified immunity because the precise Due Process requirements were "not clearly established."

It is a tenet of this Court that it does not decide federal constitutional issues in the absence of the necessity therefor. Paulussen v. Herion, ___ U.S. ___, ___, 106 S.Ct. 1339,1340 (1986)

and Rescue Army v. Municipal Court, 331 U.S. 549 (1949). As such, it must be presumed that this Court took the Loudermill case for the purpose of further interpretation and clarification of the perplexing issue involved.

Further, this Court's Loudermill decision finally laid to rest the question (established by the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974)) as to whether or not a federally constitutionally protected property interest could be conditioned upon the procedures established in a state statute pertaining to such deprivation. See Federal Pretermination Rights for State Employees, 54 Cinn. L. Rev. 1069 (1986), Erik Koehler Foster, and Due Process Constitutional Guaranty, Not Legislative Grace, 25 Duq. L. Rev. 345, Winter, 1987.

IV. LOUDERMILL OBTAINED SUBSTANTIVE RELIEF FOR HIS CLASS OF 16 MILLION TENURED EMPLOYEES; AND SUCH RELIEF CONSTITUTED FAR MORE THAN A MERE PROCEDURAL VICTORY.

Another tenet is that the Supreme Court of the United States is the final authority in determining the meaning and application of the Constitution of the United States. Connick v. Myers, 461 U.S. 138,150 (1983) and Pennek v. Florida, 328 U.S. 331,335 (1944).

Moreover, the touchstone of procedural Due Process is to protect the individual from arbitrary governmental action, Wolff v. McDonnell, 418 U.S. 539,558 (1974), by requiring the government to follow appropriate procedures when it decides to deprive an individual of life, liberty or property in accordance with the fairplay concept that is inherent in the Due Process Clause. Daniels v. Williams, 474 U.S. 327,331 (1986).

It was Loudermill's purpose to establish federal constitutional pretermination Due Process requirements for all tenured governmental employees in the United States -- which he accomplished by this Court's Loudermill decision. Therefore, unlike

the case of Hanrahan v. Hampton, 446 U.S. 754,757 (1980), cited by the Board in its Cross-Petition, Loudermill established "the entitlement to relief on the merits" of his class action claim; namely, that Due Process required some pretermination procedures for tenured governmental employees. Accordingly, he accomplished far more than a mere procedural victory for the multitude of governmental workers whose cause he championed.

Additionally, the legislative history of the federal civil rights attorney fees statute, Sec. 1988, indicates that counsel fees should be awarded pendente lite, citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and that such awards were appropriate when a party has prevailed on an important matter in the course of litigation -- even when he does not ultimately prevail on all issues. See S. Report No. 1011, 94th Congress, 2d Sess. 5, reprinted in 1976 U.S. Code Cong. Admin. News 5908,5912.

The district court's Order finding Loudermill to be a "prevailing party" (and confirmed by the Sixth Circuit) is consistent with the primary purpose of the federal civil rights attorney fees statute; i.e., to have private parties, instead of the government, bring suits to vindicate federal civil rights. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968).

CONCLUSION

Based on all that has preceded, the Board's Cross-Petition should be stricken or denied.

Respectfully submitted,



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